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# State Water Resources Control Board

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**TO:** Members of the North Coast Regional Water Quality Control Board

**FROM:** Sheryl Freeman  
Senior Staff Counsel  
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**DATE:** August 12, 2002

**SUBJECT:** Economic Considerations in Board Decision-Making

### **QUESTION PRESENTED**

Members of the North Coast Regional Water Quality Control Board have requested an overview of when the Regional Water Quality Control Boards (Regional Boards) are required to consider economics in their decision-making process.

### **BRIEF ANSWER**

At the most general level, state law provides that economic considerations, both beneficial and detrimental, are among the values to be considered in pursuing the Regional Board's mission to regulate in a manner calculated to "attain the highest water quality which is reasonable." (Water Code, §13000.) This very general policy favoring "reasonableness" is made more specific through other statutes governing specific regulatory, permitting, and enforcement activity.

For example, a Regional Board must consider economic effects when adopting or making changes to certain elements of the water quality control plan (Basin Plan), including beneficial use designation or de-designation, or the adoption or amendment of water quality objectives, total maximum daily loads (TMDLs), agricultural policies, or rules requiring the installation of specific pollution control equipment.

A Regional Board is not required to consider economics when issuing specific permits which are simply implementing adopted water quality standards and not creating new ones.

When assessing penalties for violations of waste discharge permits or violating other specified statutory prohibitions, the Regional Boards are normally directed to consider the discharger's ability to pay, and the effect of the penalty on the discharger's ability to continue in business,

among other specified factors. Such economic considerations cannot be considered, however, when assessing mandatory minimum penalties for certain chronic or serious violations.

Where applicable, the federal Clean Water Act also limits the Regional Board's ability to consider economic effects. There are various examples of when that might happen, as explored below. In short, however, to the extent that any Water Code provision or implementation activity is inconsistent with applicable provisions of the Clean Water Act, the Clean Water Act prevails.

### **DISCUSSION**

State law provides that: "[T]he activities and factors which may affect the quality of the waters of the state shall be regulated to attain the highest water quality which is reasonable, considering all demands being made and to be made on those waters and the total values involved, beneficial and detrimental, economic and social, tangible and intangible." (Water Code, § 13000.)

The essence of this language is a direction to regulate to attain the highest water quality that is reasonable. Economic concerns are provided as an example of one of the various values to consider in determining what is reasonable. This policy language is made more specific through other statutes, and adjudicative decisions interpreting them.

This area of law and policy is, not surprisingly, an area of frequent dispute, put at issue by a large percentage of the dischargers who file petitions with the State Water Resources Control Board, objecting to permitting and regulatory actions. This brief overview is intended to give the Regional Board a "road map" to the subject, but it is by no means an exhaustive analysis of this area of law and policy.

#### **1. Economic effects must be considered in certain Basin Planning activities.**

As noted at the outset, consideration of economic effects is required in Basin Plan activities that involve the adoption or amendment of water quality objectives, designating beneficial uses or de-designating beneficial uses, adopting total maximum daily loads, agricultural policies, or rules requiring the installation of specific pollution control equipment.

The Regional Board is required to consider various factors, one of which is economic considerations, when adopting water quality objectives in the Basin Plan. (Water Code § 13241(d).)<sup>1</sup>

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<sup>1</sup> / Other factors include, but are not limited to, past, present and probable future beneficial uses of water, environmental characteristics of the hydrographic unit affected, water quality conditions that could reasonably be achieved through coordinated control of all factors which affect water quality, the need for housing in the region, and the need to develop and use recycled water. (Water Code, § 13241.)

Similarly, before implementing “any agricultural water quality control program, an estimate of the total cost of such a program, together with an identification of potential sources of financing, shall be indicated in any regional water quality control plan. (Water Code § 13141.) The statute does not define “agricultural programs” for purposes of this provision. The Legislature has, however, defined agricultural activities elsewhere to mean activities that generate “horticultural, viticultural, forestry, dairy, livestock, poultry, bee, or farm product[s].” (Food & Agr. Code, §§ 564(a) and 54004.)

Additionally, the California Environmental Quality Act (Pub. Resources Code, § 21000 et seq.) (“CEQA”), requires the Regional Board to take into account economic factors when considering whether to adopt a rule or regulation that requires the installation of pollution control equipment or a performance standard or treatment requirement. (Pub. Resources Code, § 21159(a).) Specifically, CEQA states that the Regional Boards must prepare an environmental analysis of the reasonably foreseeable methods of compliance that must “take into account a reasonable range of environmental, economic and technical factors, population and geographic areas, and specific sites. (Pub. Resources Code, § 21159(c).)

Interpreting the provisions above regarding water quality objectives, agricultural programs, pollution control equipment and performance standards, the Office of Chief Counsel has advised that the adoption of TMDL implementation plans into Basin Plans also require the consideration of economic factors. (*See, e.g.*, Memorandum from Sheila K. Vassey, Senior Staff Counsel, OCC, to Stefan Lorenzato, TMDL Coordinator, SWRCB, Oct. 27, 1999.)

Economic considerations are one of the factors implicated when designating beneficial uses. “The classification of the waters of the State must take into consideration the use and value of water for public water supplies, protection and propagation of fish . . . and other purposes including navigation.” (40 C.F.R. § 131.10(a).) As with many of the references to economic considerations, this reference implicates the need to consider the economic benefits derived from protecting water quality, in addition to the costs associated with compliance.

Economic factors are also explicitly referenced for consideration when faced with a potential decision to de-designate a designated beneficial use. A Regional Board can, through a use-attainability analysis subject to EPA approval, find that attainment of a designated beneficial is not feasible, in part, because the level of constraints that would be required to attain the use “would result in substantial and widespread economic and social impact.” (40 C.F.R. § 131.10(g)(6).)

While the Regional Board is directed to consider economics in the foregoing situations, there is little guidance on the depth of analysis or weight of consideration to be afforded this factor relative to other specified factors. Framed as they are, however, in the policy terms of “factors”

and “considerations,” the state and regional boards have traditionally not applied the complexity and detail of a formal “cost-benefit analysis.” In general, however, where potential economic impacts of a proposed water quality objective appear to be significant, the Regional Board should articulate why adoption of the objective is necessary to assure the reasonable protection of beneficial uses of state waters, despite the potential adverse economic consequences. (See, e.g., Memorandum from William R. Attwater, Chief Counsel, OCC, to Regional Water Board Executive Officers, dated Jan. 4, 1994.)

## **2. Economic effects do not normally need to be considered in permitting actions.**

Economic considerations are not required when issuing specific permits that are simply implementing adopted water quality standards and not creating new ones. This is the subject of frequent dispute and has been addressed by various state board orders. More specifically, confusion has arisen over when economic considerations are required in the adoption of waste discharge requirements.

Adopted before most regions had Basin Plans and adopted water quality objectives, Water Code section 13263 states that when adopting waste discharge requirements, the regional boards shall take into consideration the provisions of section 13241, which includes, as noted previously, an economic factor.

The State Board has consistently found that Water Code section 13241 was designed for establishing objectives for inclusion into Basin Plans, and through section 13263, for establishing limitations in permits where objectives were still lacking in the many Basin Plans during the early days of the program. Thus, section 13263 is construed to apply now only where the limitation in a specific permit is outside the scope of water quality objectives adopted in an applicable Basin Plan. (See, e.g., *Hampson v. Superior Court* (1977) 67 Cal.App.3d 472, 481; and various State Board Orders, including, *Napa Sanitation District*, WQO 2001-16, *City of Palo Alto*, WQO 94-8; *Pacific Gas & Electric*, WQO 77-10; and *Rancho Caballero*, WQP 73-4.)

## **3. Economic factors must be considered in calculating certain statutory penalties, except where mandatory minimum penalties are required.**

When assessing penalties for violations of waste discharge permits or violating other specified statutory prohibitions, the Regional Boards are normally required to consider the discharger’s ability to pay, and the effect of the penalty on the discharger’s ability to continue in business. (Water Code, § 13385(c).)

In a significant exception to this rule, however, economic considerations cannot be considered when assessing mandatory minimum penalties for certain chronic or serious violations, as specified by state law. (Water Code, § 13385(h) and (i).)

Additionally, there is also a requirement that at a minimum, all penalties outside the scope of the mandatory minimums must be assessed at a level sufficient to recover any economic benefit derived by the discharger from the acts that constitute the violation. (Water Code, § 13385(e).)

#### **4. Miscellaneous**

There are a variety of other permitting and regulatory areas in which economic factors are considered to some degree. For example, economics are implicated in determining what are “cost-effective and reasonable best management practices for nonpoint source control” for antidegradation analysis purposes. (40 C.F.R. §131.12(a)(2).) Similarly, economics are implicated in various other performance standards and measures, such as “best practicable treatment and control,” “maximum benefit to the people of the state,” what is “feasible” in mitigation requirements, and when a compliance schedule is “as short as practicable,” to name a few. (See, e.g., section 2.1 of the State “Policy for Implementation of Toxics Standards for Inland Surface Waters, Enclosed Bays, and Estuaries of California,” p. 19.)

In issuing an order requiring the submittal of technical reports, state law provides that “the burden, including costs, of these reports shall bear a reasonable relationship to the need for the report and benefits to be obtained from the reports.” (Water Code, § 13267.)

Another example can be found in State Board Order 92-49, which provides that cleanup levels can be set at less than background level only where it is demonstrated that it is technologically or economically infeasible to achieve background levels, and provided that the alternative cleanup level is “consistent with maximum benefit to the people of the state.” (SWRCB, Res. No. 92-49, provisions “G” and “H”; see also 23 C.C.R. 2550.4.)

#### **5. Economic factors may not be used where to do so would result in inconsistency with the Clean Water Act.**

Finally, as previously noted, the federal Clean Water Act limits the Regional Board’s ability to consider economic effects.

This would generally occur in situations involving NPDES permits. For example, where the discharge of a pollutant has a “reasonable potential” to contribute to an exceedance of a water quality standard, the Regional Board must impose effluent limitations that are as stringent as necessary to comply with that water quality standard. (33 U.S.C. §1311(b)(1)(C); 40 C.F.R. §122.44(d)(1).) This requirement leaves little room to consider economic factors relating to the “reasonableness” of the resulting limitation. (See, e.g., *Ackels v. EPA* (9<sup>th</sup> Cir. 1993) 7 F.3d 862, 865-866; and *Defenders of Wildlife v. Browner* (9<sup>th</sup> Cir. 1999) 191 F.3d 1159, 1163.) Similarly,

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economic considerations cannot negate the requirement that all NPDES permits for wastewater treatment plants must include a bypass prohibition. (40 C.F.R. §122.41(m).)

Those are just two of myriad possible examples of the more general legal point that, to the extent that any Water Code provision or implementation activity is inconsistent with applicable provisions of the Clean Water Act, the Clean Water Act prevails. (*See* Water Code, § 13372.)